

STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals:
Fitzgerald, P.J., and Bandstra, J. and Schuette, JJ.

ESTATE OF DANIEL CAMERON, by
DIANE CAMERON & JAMES CAMERON,
Co-GUARDIANS,

Plaintiffs/Appellants,

Supreme Court No. 127018

Court of Appeals No. 248315

v.

Washtenaw Probate Case No. 02-549-NF
Hon. John N. Kirkendall

AUTO CLUB INSURANCE ASSOCIATION,

Defendant/Appellee,

PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEF ON APPEAL

"ORAL ARGUMENT REQUESTED"

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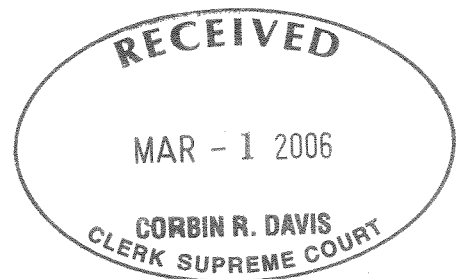


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STATEMENT OF QUESTION INVOLVED

- I. THE QUESTION DIRECTED BY THIS COURT'S ORDER IS WHETHER THE RJA TOLLING PROVISION OF MCL 600.5851(1) FOR MINORITY AND INCOMPETENCY APPLY TO THE "ONE YEAR BACK RULE" OF THE NO-FAULT STATUTE MCL 500.3145(1)?

The Trial Court answered: "Yes"

The Court of Appeals answered: "No"

Plaintiffs/Appellants answer: "Yes"

Defendant/Appellee answers: "No"

ARGUMENT

- I. THE NO-FAULT STATUTE OF LIMITATIONS, MCL 500.3145, APPLIES TO THE TOLLING FOR MINORS AND INCOMPETENTS FOR NOTICE, SUIT AND THE ONE YEAR BACK PROVISIONS. THE NO-FAULT STATUTE USES "INCURRED" TO CLEARLY APPLY TOLLING FOR MINORS AND INCOMPETENTS FOR THE ONE YEAR BACK PROVISION. THE TEXT, LOGIC AND PUBLIC POLICY JUSTIFY THE TOLLING.

The reference to the one year back rule is contained in MCL 500.314 is a wordy, convoluted statutory provision that blends notice of claims, commencement of suit, one year back rule and specific notice of claim requirements. Sec. 3145(1) in its entirety provides:

"500.3145. Limitations as to actions for personal or property protection benefits; notice of injury

Sec. 3145.(1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury."

(Emphasis supplied)

In examining the statute, the first sentence talks about an action commencement within one year of the accident but then goes on to state that either the notice or payment within one year is sufficient. Is that provision a notice provision or a statute of limitation with a notice and/or payment exception built in to extend the one year? The one year back

sentence is attached to that language and is a continuation of that paragraph and thought. A legally competent adult would have to give notice within one year or receive some payment to satisfy the initial one year requirement. They could then, however, bring suit going back for benefits up to one year. A minor or incompetent person, does not have the legal capability to bring a suit. The tolling of the statute, provides and would allow them to bring a suit and seek benefits later than one year back. To do otherwise would extend a hollow right to sue but not seek the benefits for the period of disability that the statute excused. The last two sentences of the paragraph exclusively deal with the specific notice requirements.

It should also be noted that the heading of Sec. 3145 provides, "Limitations as to actions for personal or property protection benefits; notice of injury." The statute is dealing with notice and limitations of action not a damage cap or limit to any damages. One of the rules of construction is to provide that the statute shall be read as a whole. See Sweatt v Dept. of Corrections, 468 Mich 172; 661 NW2d 201 (2003). The limit on the one year back provision in the normal case, applied to a competent adult, filing and seeking back benefits would be entirely fair and appropriate. However, where there are minors or incompetents incapable of suing, allowing an exception is consistent with the statutory scheme for minors and incompetents. The no-fault statute of limitations, Sec. 3145(1) needed a one year back rule to deal with the competent adult who would not be under any minority or incompetency to limit the period back. No-fault benefits are lifetime benefits, and a competent adult, without the one year back rule, could bring the suit anytime and seek benefits many years back. The one year back rule serves as a limit to those competent adult claimants who suffer no incapacity. However, the fact that the legislature needed a one year back rule for competent

adults, does not address whether suit and the one year back rule would be tolled by the tolling provision for the mentally incompetent and the minors.

Furthermore, the statutory language used in the one year back provision bars benefits "incurred" more than one year back. It is anticipated that the Defendant will cite Howard v General Motors Corp., 427 Mich 358; 399 NW2d 10 (1986) for the legal argument that the, "one year back rule" of MCL 500.3145 is a limitation of damage provision which cannot be tolled by the provisions of MCL 600.5851(1). The Defendant's reliance on the limitation of claims provisions of MCL 418.381 of the Worker's Disability Compensation Act is flawed. The language of the back rules of MCL 418.381 and MCL 500.3145 are materially distinguishable. MCL 500.3145 states in part as follows:

"If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced..."

(Emphasis supplied)

MCL 418.381 states as follows:

"418.381. Claim for compensation; notice of injury; time

Sec. 381 (1) A proceeding for compensation for an injury under this act shall not be maintained unless a claim for compensation for the injury, which claim may be either oral or in writing, has been made to the employer or a written claim has been made to the bureau on forms prescribed by the director, within 2 years after the occurrence of the injury. In case of the death of the employee, the claim shall be made within 2 years after death. The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury. Failure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide such notice. In the event of physical or mental incapacity of the employee, the

notice and claim shall be made within 2 years from the time the injured employee is not physically or mentally incapacitated from making the claim. A claim shall not be valid or effectual for any purpose under this chapter unless made within 2 years after the later of the date of injury, the date disability manifests itself, or the last day of employment with the employer against whom claim is being made. If an employee claims benefits for a work injury and is thereafter compensated for the disability by worker's compensation or benefits other than worker's compensation, or is provided favored work by the employer because of the disability, the period of time within which a claim shall be made for benefits under this act shall be extended by the time during which the benefits are paid or the favored work is provided.

(2) Except as provided in subsection (3), if any compensation is sought under this act, payment shall not be made for any period of time earlier than 2 years immediately preceding the date on which the employee filed an application for a hearing with the bureau.

(3) Payment for nursing or attendant care shall not be made for any period which is more than 1 year before the date an application for a hearing is filed with the bureau."

(Emphasis supplied)

Also, from a textual standpoint, the tolling provisions for minors and the tolling provisions in Worker's Compensation are physically and logistically different. The RJA MCL 600.5851(1) tolling is a separate statute which, if as the appellants contend, applies to the no-fault §3145 would be consistent to toll all provisions within the statute not simply the filing at the beginning portion and notice at the end portion. However, the Worker's Compensation tolling provision is solely contained in Sec. 1 of that portion of the Act where the claim and filing deadlines are placed. The Worker's Compensation one year back section (2) which provides a limit of two year back for any compensation claims and, section (3) which provides one year back for nursing and attendant care, are contained in separate statutory provisions than the notice of claim and filing requirement of paragraph (1). In the Worker's

Compensation the tolling provisions are contained with the notice and filing requirements and are completely divorced from the two and one year back provisions. Thus, the tolling provision for the Revised Judicature Act if it applies to §3145 would appear, from a consistency standpoint, to apply to all the provisions within §3145 and, that the Worker's Compensation portion, which itself only provides tolling for notice and filing of claim, can easily be distinguished based upon the legislative drafting and the different statutory provisions.

Also, the no fault one year back rule is distinguishable from worker's compensation one and two year back rules in that the no fault one year back rule uses the word "incurred" which this Court and other appellate decisions have held to have special meaning under the No Fault Act. The limitations of action provisions of MCL 500.3145 apply to "incurred" expenses only. The back rules of MCL 418.381 do not contain similar language. An expense is not incurred until the injured person becomes legally liable for the expense. See Bombalski v Auto Club Insurance Association, 247 Mich App 536; 637 NW2d 251 (2001). The Bombalski Court stated:

"Plaintiff submits that he likewise became liable for the amounts charged by his health care providers when he accepted their services and that consequently he incurred the full amounts charged. Plaintiff's claim does not persuade us, however, because plaintiff overlooks the significance of 'liable,' which means '[r]esponsible or answerable in law; legally obligated.' Black's Law Dictionary, *supra* at 927. The satisfaction of plaintiff's medical bills by BCBSM through payment of less than the amounts charged by the providers relieved plaintiff of any responsibility or legal obligation to pay the providers further amounts exceeding those proffered by BCBSM and accepted by plaintiff's health care providers. Because plaintiff bears no liability for the full medical service amounts initially charged by his health care providers, he has not *incurred* these full charges. see Moghis, supra at 249, 466 N.W. 2d 290 quoting from Manley v DAIIE, 425 Mich. 140, 159, 388 N.W.2d 216 (1986), that an insurer paying benefits pursuant to §3107 need not pay any amount 'except upon submission of evidence that services were actually rendered and of the actual cost expended.' " (Emphasis supplied, *ibid*, at p. 555)

In Proudfoot v State Farm Mut. Ins. Co., 469 Mich 476; 673 NW2d 739 (2003), this Court gave similar meaning to the word incurred:

“To ‘incur’ means ‘[t]o become liable or subject to, [especially] because of one’s own actions.’⁴ A trial court may enter ‘a declaratory judgment determining that an expense is both necessary and allowable and the amount that will be allowed,[but s]uch a declaration does not oblige a no-fault insurer to pay for an expense until it is actually incurred.’ *Manley, supra* at 157. At the time of the judgment, plaintiff had not yet taken action to become liable for the costs of the proposed home modifications. Because the expenses in question were not yet ‘incurred,’ the Court of Appeals erred in ordering defendant to pay the total amount to the trial court. See *Nasser v. Auto Club Ins Ass’n*, 435 Mich 33, 50, 457 NW2d 637 (1990).”

The debts of minors and incompetents are not legally incurred and cannot be released or waived by MCL 500.3145. Upon reaching the age of majority, a minor may affirm or disaffirm his or her contract and even recover the amount paid by the minor. See Poli v National Bank of Detroit, 355 Mich 17; 93 NW2d 925 (1959). An infant or his or her guardian while infancy exists cannot determine whether a minor’s voidable contract shall be affirmed or annulled since that decision is a matter for the minor when he or she reaches the age of majority. *Ibid.*, at p. 18. A parent has no authority to compromise a disputed claim or settle a claim on behalf of a child absent compliance with the formal procedures required by Court protection. See Smith v YMCA, 216 Mich App 552, 556; 550 NW2d 262 (1996). See also Bowden v Hutzel Hospital, 252 Mich App 566; 652 NW2d 529 (2002), judgment modified in 468 Mich 851; 658 NW2d 483 (2003).

In the same manner that the debts of minors are not legally binding or incurred, a claim against a mental incompetent without a guardian being appointed is voidable. See Great Lakes Realty Corp. v Peters, 336 Mich 325; 57 NW2d 901 (1953). The Great Lakes court stated:

"Incompetent persons are protected by our law because they are deemed to be unaware of the realities of life and unable to sense the significance of these things which may affect them. In the true sense they have no control over their acts because they are unable to comprehend them. Such a person, faced with litigation or, as in this case, with a judgment forfeiting a home, should be given all of the protection that the law affords. It cannot be said of the Peters that circumstances at the time of judgment were under their control for they did not have the capacity to make a decision. They were prevented from taking an appeal from the judgment of forfeiture by their mental and physical condition, a situation over which they had no control."

(Ibid, at p. 333)

Contracts or conveyances of mentally incompetent persons made before an adjudication of mental incompetency are voidable. See Brown v Khoury, 346 Mich 97; 77 NW2d 336 (1956). See also Goicaj v Moser, 140 Mich App 828; 366 NW2d 54 (1985). A mentally incompetent person cannot consent to any legal proceedings or waive any legal rights. See North v Washtenaw Circuit Judge, 59 Mich 624; 26 NW 810 (1886).

The Michigan Court Rules recognize that minors and incompetents require special protection. An incompetent person and minor cannot give legal consent. MCR 2.201(E) provides that an action may not proceed unless the court appoints a competent and responsible person to act as the legal representative for a minor or incompetent person. MCR 2.201(E) provides in part as follows:

"(E) Minors and Incompetent Persons. This subrule does not apply to proceedings under chapter 5.

(1) *Representation.*

(b) If a minor or incompetent person does not have a conservator to represent the person as a plaintiff, the court shall appoint a competent and responsible person to appear as next friend on his or her behalf, and the net friend is responsible for the costs of the action.

(c) If the minor or incompetent person does not have a conservator to

represent the person as defendant, the action may not proceed until the court appoints a guardian ad litem, who is not responsible for the costs of the action unless, by reason of personal misconduct, he or she is specifically charged costs by the court."

(Emphasis supplied)

The Court rules also recognize that court approval is necessary before a minor or incompetent person's cause of action can be lawfully settled. See MCR 2.420.

Therefore, since MCL 500.3145 only applies to "incurred" expenses, the one year back rule cannot lawfully be used to extinguish the claims of minors or incompetent persons during the period of time that a person is incompetent or under the age of majority. Upon bringing the suit, the disabled person armed with a court appointed guardian or conservator under Court Rule, can recognize those expenses and seek reimbursement from the no-fault carrier. Upon filing suit, the claim is raised and the minor or incompetent with a court approved representative has acknowledged the debt and can seek reimbursement. The one year back sentence with the use of the word "incurred" contemplates a legally competent claim and so limits the competent or adult claimant to one year back.

When you look at §3145 as a whole, the one year limitation language and the suit language, suggest that the language is more a statute of limitations than a notice provision. If the language was considered a notice provision, the no-fault carrier can receive notice by suit or writing consistent with the approved language of the statute, or, payment by the no-fault carrier of any benefit within the first year. If this was a notice provision, then a statute of limitations would not exist under the No-Fault Act and, under the Revised Judicature Act, the statute of limitations would be six years for a contract. See MCL 600.5807(8). Under the reasoning of the Cameron decision and the logic urged by Defendant, the tolling provisions

would apply because the limitation was contained within the Revised Judicature Act. However, the §3145 heading, "Limitation of Actions, and the language within the provision, "action for recovery... not commenced." And, subsection (2), imposes a statute of limitations of one year on property damage claims, which makes the entire statutory provision appear to be a limitation of action rather than a notice or damage provision.

The Court of Appeals has looked at this blended statute and held that the tolling provision for minority and incompetency tolls both the one year suit requirement and the one year back rule. Geiger v DAILE, 114 Mich App 283; 318 NW2d 833 (1982). As pointed out by the Geiger court, if the right to bring suit is tolled due to minority, to bar the recovery of benefits more than one year back would thwart the legislative goal of providing the minors or mentally incompetent with the right to sue but taking away their benefits during the very period that their right has been extended. Other appellate cases finding that the minority and incompetency tolling provision apply to the statute of limitations and to the one year back provision, see Professional Rehab Associates v State Farm Mut. Auto. Ins. Co., 228 Mich App 167; 577 NW2d 909 (1998). Manley v Detroit Auto Inter-Insurance Exchange, 127 Mich App 444; 339 NW2d 205 (1983), affirmed in part, 425 Mich 140, 388 NW2d 216 (1983). It has also been held that death tolls the statute of limitations and the 1 year back rule, Taubee v Mosley, 127 Mich App 45; 338 NW2d 547 (1983).

Furthermore, if the one year back rule was a damage cap and did not toll the running of statutes of limitations, then the RJA statute which gives government institutions the right to bring suit with no imposed statute of limitations would thwart government entities. See MCL 600.5821(4); Regents of the University of Michigan v State Farm Mut. Auto Ins. Co., 250

Mich App 719; 650 NW2d 129 (2002). The statute tolling for governmental entities provides:

“(4) Actions brought in the name of the state of Michigan, the people of the state of Michigan, or any political subdivision of the state of Michigan, or in the name of any officer or otherwise for the benefit of the state of Michigan or any political subdivision of the state of Michigan for the recovery of the cost of maintenance, care, and treatment of persons in hospitals, homes, schools, and other state institutions are not subject to the statute of limitations and may be brought at any time without limitation, the provisions of any statute notwithstanding.”

(Emphasis supplied)

If the one year back rule was a damage limitation unaffected by tolling as a statute of limitations, then a government hospital such as the University of Michigan, or state psychiatric facilities, Department of Mental Health or Medicaid may lose years of benefits for care provided that they later discover is auto-related or that they finally identify the correct no-fault insurer. If the one year back provision was a damage cap, an absolute bar tucked in the middle of the bowels of the statute of limitations, then none of the tolling for government, minors, incompetents, or deceased would be afforded the protection those statutes were meant to provide.

The one year back rule can be literally applied but, the notice, time of suit, and one year back rule can and should be subject all to the same consistent statutory tolling for minority, incompetents, government and decedents. The statute made special accommodations in each of those statutory provisions and a consistent approach to reading §3145 as a limitation of action and applying tolling to each of the items within that section would be a consistent means of statutory construction. The Geiger court and the other courts that have read §3145 as a tolling not only of the statute of limitations but the one year back

provision. The courts have recognized the inherent inconsistency of tolling and giving a grace period for someone's right to sue because of disability but having the damages for that disability period extinguished.

There is a Common Law doctrine, "Contra non valentem agere nulla currit prescriptio." (A prescription does not run against the party who could not bring a suit). See where this concept is discussed at 54 CJS Limitations of Actions §115; Kalakay v Farmers Ins. Group & DAIE, 120 Mich App 623, 626-627; 327 NW2d 537 at 539 (1982); Lemmerman v Fealk, 449 Mich 56; 534 NW2d 695 (1995) in Justice Weaver's concurrence at 80-81.

The common sense doctrine and rational public policy of not allowing a suit to run on someone who is not capable of bringing a suit is not only common sense but also consistently applies the tolling provisions to the entire §3145 statute. To do otherwise would be to apply the tolling limitation to all but two sentences buried in the middle of the notice and statute of limitations provisions. Furthermore, applying the tolling statute to the one year back provision also preserves the right of not only minors or incompetents but also death claims, governmental entities not subject to statute limitations and care providers claiming directly against the no-fault carrier such as in Professional Rehab Associates v State Farm Mut. Auto. Ins. Co., 228 Mich App 167; 577 NW2d 909 (1998). The tolling pronouncements for minors and incompetents provides those disabled persons with a one year grace period after their disability is lifted to sue for benefits. Application of the tolling provision to the entire §3145 limitation is consistent with the current law, the purpose of the tolling provisions and the goals of the no-fault law to provide accident victims with insurance funded benefits rather than shifting those costs to public Medicaid or other governmental funds.

The wisdom of applying the tolling provisions to statutory causes of actions was wisely summarized by our Michigan Supreme Court in Lambert v Calhoun, 394 Mich 179; 229 NW2d 332 (1975) at 191:

“There is scant reason to ascribe to a legislature an intent to distinguish between common-law and statutory causes of action in the application of saving provisions. This is especially without warrant in the application of domestic saving provisions to domestic statutory causes of action.

The need and desirability for saving in one case are the same as in the other. Infants or insane persons are under the same disability whether their actions be common-law or statutory; the defendant in one case is generally in no greater need than the defendant in the other of protection from delay in commencement of the action. We are unable to distinguish the two cases or to ascribe to the Legislature such an intention.”

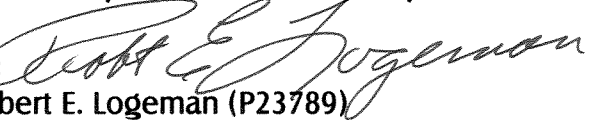
The tolling provision applies to the notice, suit, and one year back limitations. The Cameron decision suggesting that the Legislature used the words “bring an action under this Act” compared to “bring an action” involve massive exclusion of minors, incompetents, governmental entities and health care providers from tolling for no-fault benefits. For such a massive change of law with legislative history absolutely to the contrary is an example of an argument taking a small change in phrasing and claiming massive legislative change. As our U.S. Supreme Court says when similar arguments are made the Court says Congress does not embrace drafting that involves monumental changes in obscure phrases in language. The Court suggested that Congress does not “... attempt to try to hide elephants in mouse holes.” See Whitman v American Trucking Assoc., 531 US 457, 468; 121 S Ct 903 (2001). As the U.S. Supreme Court says textual arguments ultimately flounder on this principal.

In short, the tolling provision that has been consistently applied by the Court of Appeals to the suit and one year back rule and notice is an appropriate application of the tolling provision to the No-Fault Act. It is textually accurate and consistent with logic and public policy.

It is respectfully urged that this Court reach the same conclusion.

Respectfully submitted:

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